No. 14655

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Estates of
JACK P. KALPAKOFF (District Court No. 60963-T),
MARY KALPAKOFF (District Court No. 60964-T),
Debtors.

Petition for Rehearing of Motions to Reverse by Reason of Dismissal for Mootness and Recall of Mandate, With Suggestion for Hearing En Banc.

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To the Honorable the United States Court of Appeals for the Ninth Circuit, Stephens, Fee, and Chambers, Circuit Judges, Being the Court as Constituted in the Original Hearing:

Comes now the appellant Walter C. Durst, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, and hereby, pursuant to the provisions of Rule 23, respectfully petitions for a rehearing of (1) Motion to Reverse and to Remand the Cause with Instructions to Vacate and Set Aside Orders and Dismiss for Mootness, and (2) Motion to Recall the Mandate, which said two motions were denied by Order dated November 2, 1955.

The petition for a rehearing of the said motions is based on the fololwing grounds:

1. The Court acted under a mistake of fact which nullifies the order.

2. The Court erred in matters of law and fact in arriving at its order.

3. The cause is appropriate for *en banc* hearing.

POINT I.

The Court Acted Under a Mistake of Fact Which Nullifies the Order.

A mistake of fact apparently lies in the use of the words in the order "citation for contempt." The District Court made a finding of contempt [R. 186] following a certificate of the referee of purported proceedings had before him. No citation for contempt was issued by the District Court.

The turnover order of the referee in bankruptcy was reviewed by petitioner by the filing of a petition for review [R. 30] which *ipso facto* removed the cause from the jurisdiction of the referee in bankruptcy under the doctrine of *Brown v. Detroit Trust Co.,* 193 Fed. 622. Following the filing of said petition for review, the referee in bankruptcy purported to certify petitioner to the District Court [R. 35]. Prior to the finding of contempt petitioner offered objections to the certificate and was denied his right so to do. The proceedings were without due process of law, guaranteed by the Fifth Amendment, United States Constitution, and in violation of his constitutional rights thereunder. Said objections to the certificates of the referee were offered [R. 184], were ordered lodged [R. 188], and were marked as Exhibits L and M for identification [R. 190]. It

appears the referee by letter dated August 13, 1954, indicated that the turnover order might have been premature [Ex. "N," R. 190].

Further mistake of fact apparently lies in the omission from the said order of the facts respecting the special appearances of the petitioner and the challenges made to the jurisdiction [Schedules in Bankruptcy, p. 12; R. 20; R. 22; Ex. "K"; R. 44; R. 71; Exs. "F," "O"; R. 200].

Further mistake of fact appears to lie in the inclusion in the title of the case in said order of the words "Jack P. Kalpakoff and Mary Kalpakoff, and . . ." It is believed that said persons have at no time entered their appearances in this appeal or any other proceeding herein, except in the proceedings instituted by them June 2, 1954 [R. 10 and 17], and from which petitioner filed a petition for review on June 23, 1954.

Further mistake of fact apparently lies in the omission from the said order of the facts respecting the prior pending plenary State Court equity receivership suit No. Transferred to Los Angeles S. F. C. 914 [R. 95, 106, 123; Ex. "E" pp. 223 to 235, answer filed; Ex. "I" sheet marked 1., Proposed Real Property Arrangement]. In said suit the rights of upwards of $110,000 total creditors appear to be vested while in bankruptcy many of the upwards of $30,000 of said creditors who have had no payment for over six years may be exposed to the statute of limitations.

Further mistake of fact appears in the omission from the order of reference to adverse claims of petitioner, appearing specially, of creditors indispensable parties respondent [R. 106]; of absence of consent by petitioner, appearing specially, to plenary proceedings in the bankruptcy court; and omission of reference to the scheduled interest of the debtors as resulting *cestui que* trust of the general assignment [R. 8-9], and the trustee in bankruptcy a marriage and blood relation of the debtors [R. 99] as successor resulting *cestui que* trust.

Further mistake of fact apparently lies in the omission from the said order of the fact that in California the trust created by the general assignment follows the land and that it is the duty of the petitioner under the doctrine of *Chittenden v. Brewster,* 69 U. S. 191, to preserve the trust created by the general assignment, and is entitled to have his expenses reimbursed in so doing.

Further mistake of fact apparently lies in the omission from the said order of the fact that the object of the general assignment [R. 14] is to sell the land, pay the creditors 100 cents on the dollar, if possible, pay the petitioner his commissions [R. 16] and as set forth in the schedules and amended schedules; pay the fees of Morris Lavine attorney for the petitioner [R. 14], the surplus, if any, to the debtors as resulting *cestui que* trust and the trustee in bankruptcy as successor resulting *cestui que* trust, as their scheduled [R. 8-9] interest appears.

POINT II.

The Court Erred in Matters of Law and Fact in Arriving at Its Order.

It is believed the order of November 2, 1955, was improvidently made in that while the word mootness appears in the heading of the order, it does not appear in said order that the appeal herein was dismissed for mootness, neither does it appear that consideration was given to the doctrine of *United States v. Munsingwear,* 340 U. S. 36, and *Acheson v. Droesse,* 197 F. 2d 574. As set forth in a document named "Opposition to Motion for Recall of Mandate" on page 4, lines 15 to 18:

> ". . . The question in the case at bar was moot before the appeal was taken, not by reason of some change in the law, but by reason of compliance with the order by movant . . ."

Under the aforesaid doctrine petitioner, by reason of the motion to reverse, is entitled to have the turnover order and all orders which "Spawned" therefrom reversed, vacated, and set aside and the proceedings dismissed, herein, and also orders in appeal No. 14907.

Furthermore, petitioner asserts that all contentions and authorities urged by petitioner are established as the law of the case by reason of the dismissal for mootness which implies there is no issue of fact to support a justiciable controversy, and the motions referred to in the order of November 2, 1955. See R. 211 to 225, and statement of points in appeal No. 14907.

POINT III.

En Banc Hearing.

In consideration of the authority of 28 U. S. C. Section 46(c) and the doctrine of *Western Pacific Railroad Case,* 345 U. S. 247, it is suggested that the within case is appropriate for consideration by all of the active Judges of the Court of Appeals for the Ninth Circuit. Said suggestion is made on the ground that the orders of the Division herein do not appear to be in harmony with holdings that an assignee for the benefit of creditors, may be an adverse claimant, which would create a division between this court and a Division of the United States Circuit Court of Appeals, Ninth Circuit composed of Gilbert, Morrow, and Rudkin, Circuit Judges, in the case of *Henderson v. May* (in the matter of George W. Coven, Inc.), 289 Fed. 192, and of the Supreme Court in *May v. Henderson,* 268 U. S. 111, 69 L. Ed. 870, and general assignment cases therein cited, notwithstanding Bankruptcy Act Sections 2a (21), 475, and 509, of the Chandler Act, which in no way effect the applicability of 28 U. S. C. Section 1652, and Rule 62(f) of the Federal Rules of Civil Procedure.

ARGUMENT.

Thus the language of the order creates a doubt as to whether the Court, after examining the facts of the case under consideration, concluded that facts respecting the "citation for contempt," omission of reference to "special appearance," inclusion in title of names of persons not appellees, omission of reference to mootness, were needful to support the contentions and authorities of petitioner.

> "The best and the only proper way of disposing of erroneous rulings is to promptly recall them when the opportunity for so doing is presented."
>
> *Wagnon v. Pease,* 104 Ga. 417 at 430.

The order of November 2, 1955, appears to have been obtained upon a false suggestion appearing in a document named "Opposition to Motion for Recall of Mandate," page 2, lines 10 to 16, which reads:

> "Movant petitioned the District Court for a review of the turn-over order and the order was affirmed on November 29, 1954. Thereafter, the movant was cited for contempt for failure to obey the referee's order and appeared in court in response to said citation on December 7, 1954, compiled with the referee's order, and the contempt proceeding was dismissed and movant was fully exonerated."

The asserted false suggestion found its way into the order of November 2, 1954, reading in part:

> ". . . A review of the turn over order was had to the district court and was affirmed. The

movant did not obey the turn over order and a citation for contempt issued against him. Thereafter he complied, and the contempt proceeding was dismissed and movant was exonerated."

In contemplation of law an order obtained upon a false suggestion is not the order of the Court, and may be treated as a nullity.

In re Rothrock (1939), 14 Cal. 2d 34, 92 P. 2d 634.

Mandate recalled for incorrect description of title.

Killian v. Ebbinghaus, 111 U. S. 798.

It is admissible in the circumstances for the Court of Appeals to change its first decision and correct the mistake.

Twin Falls Co. v. Caldwell, 266 U. S. 85 at 90.

Where an appeal is dismissed for mootness, any right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction in said appeal is *res judicata,* except that the appellant may avoid such *res judicata* as to each right, question or fact decided adversely to him by moving to reverse and remand the cause and set aside all orders and dismiss all proceedings involved in the appeal affecting the appellant.

United States v. Munsingwear, Inc., 340 U. S. 36;

Securities and Exchange Commission v. Harrison, 340 U. S. 908;

Acheson v. Droesse, 197 F. 2d 574.

For the above reasons, the Petitioner respectfully prays that this court grant a rehearing.

Dated, November 25, 1955.

WALTER C. DURST, assignee for the benefit of creditors, appearing specially, Petitioner.

MORRIS LAVINE, and
WALTER C. DURST,
Attorneys for Petitioner Appearing Specially.

Certificate of Counsel.

I, MORRIS LAVINE, attorney for petitioner, hereby certify that in my opinion the petition for rehearing is being prosecuted in good faith and is meritorious and is not being prosecuted for the purposes of delay.

MORRIS LAVINE,
Attorney for Petitioner Appearing Specially.